

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WILD FISH CONSERVANCY,  
Plaintiff-Appellant,  
vs.

KENNETH L. SALAZAR, in his  
official capacity as  
Secretary of the Interior;  
U.S. FISH & WILDLIFE  
SERVICE; ROWAN W. GOULD, in  
his official capacity as  
Acting Director of the U.S.  
FISH & WILDLIFE SERVICE;  
JULIE COLLINS, in her  
official capacity as Complex  
Manager for the Leavenworth  
National Fish Hatchery  
Complex,

Defendants-Appellees.

NO. CV-05-0181-LRS

ORDER ON REMAND, GRANTING  
DECLARATORY AND INJUNCTIVE RELIEF

This matter comes before the Court on remand from the Ninth Circuit Court of Appeals with directions to grant plaintiff Wild Fish Conservancy's ("WFC") motion for summary judgment and to grant injunctive relief until the United States Fish and Wildlife Service ("FWS") complies with its obligations under the Endangered Species Act ("ESA"). *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). The Court has considered Plaintiff's Motion for Declaratory and Injunctive Relief, Ct. Rec. 166, Defendants' Opposition to Plaintiff's Motion for Declaratory and Injunctive Relief, Ct. Rec. 171, Plaintiff's Reply in Support of Motion for Declaratory and Injunctive

1 Relief, Ct. Rec. 186, Amicus Declaration of Joe Peone, Ct. Rec. 172-1,  
2 and Amicus Declaration of Steven S. Parker, Ct. Rec. 179. The Court  
3 held hearings on this matter on March 30, 2011, April 19, 2011, and  
4 May 4, 2011. The Court has considered all additional pleadings and  
5 sworn statements filed herein and, except as otherwise noted, has  
6 assigned such weight thereto as deemed appropriate in light of the  
7 mandate filed by the Ninth Circuit Court of Appeals in this  
8 litigation.

9 On December 7, 2010, the Ninth Circuit Court of Appeals reversed  
10 and remanded this case holding:

11 Here, the Service committed legal error by  
12 limiting the scope of the action to five years;  
13 failing to articulate a rational connection  
14 between its findings in the 2008 BiOp and its no  
15 jeopardy conclusion; and issuing an inadequate  
16 incidental take statement. The Hatchery's reliance  
17 on a legally flawed biological opinion was  
18 arbitrary and capricious. The Hatchery therefore  
19 violated its substantive duty to ensure that its  
20 operations and maintenance did not jeopardize the  
21 continued existence of the bull trout.

22 We conclude that the 2008 BiOp is arbitrary and  
23 capricious because the Service limited the  
24 analysis to a five-year period, failed to  
25 articulate a rational connection between the facts  
26 found and the conclusions made, and issued an  
27 incidental take statement lacking adequate  
28 monitoring and reporting requirements.  
Additionally, the Hatchery violated its  
substantive duty to ensure that its operations did  
not jeopardize the continued existence of the bull  
trout. We reverse and remand to the district court  
with directions to grant the Conservancy's motion  
for summary judgment and to grant injunctive  
relief until the Service complies with its  
obligations under the ESA.

26 *Wild Fish Conservancy*, 628 F.3d at 532.

27 Being fully advised in the matter, the Court grants Plaintiff's  
28 Motion for Declaratory and Injunctive Relief, **Ct. Rec. 166.**

1 Accordingly,

2 **IT IS HEREBY ORDERED:**

3 1. The Order Granting Defendants' Motion for Summary Judgment and  
4 Denying Plaintiff's Motion for Summary Judgment, **Ct. Rec. 149**, is  
5 **VACATED**. Plaintiff's Motion for Declaratory and Injunctive Relief, **Ct.**  
6 **Rec. 166**, is **GRANTED**.

7 2. Plaintiff's Motion for Summary Judgment on Liability, **Ct. Rec.**  
8 **113**, is **GRANTED in part and DENIED in part** as provided in the Ninth  
9 Circuit Court of Appeals' decision in *Wild Fish Conservancy v.*  
10 *Salazar*, 628 F.3d 513 (9th Cir. 2010).

11 3. Federal Defendants' Cross-Motion for Summary Judgment on  
12 Liability, Ct. Rec. 128, is **GRANTED in part and DENIED in part** as  
13 provided in the Ninth Circuit Court of Appeals' decision in *Wild Fish*  
14 *Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010).

15 4. FWS' 2008 BiOp is arbitrary, capricious, an abuse of  
16 discretion, and otherwise not in accordance with law.

17 5. The 2008 BiOp is hereby set aside under the Administrative  
18 Procedure Act, 5 U.S.C. § 706(2).

19 6. FWS is in violation of its substantive obligation under  
20 section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. §  
21 1536(a)(2), to insure that operations of the Hatchery are not likely  
22 to jeopardize the continued existence of threatened bull trout.

23 7. FWS is ordered to re-initiate consultation under section  
24 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and to issue a new  
25 biological opinion evaluating, inter alia, the effects of the Hatchery  
26 on threatened bull trout and its critical habitat based upon the best  
27 scientific and commercial data currently available.

28 8. FWS is ordered to provide the Court and WFC copies of the new

1 biological opinion upon its completion.

2 9. FWS is ordered to minimize the irreparable harm the Hatchery  
3 inflicts on threatened bull trout by removing all racks and boards in  
4 structure 5 and by maintaining both radial gates at structure 2 in  
5 fully opened positions, subject to those exceptions noted below, until  
6 a new biological opinion is issued and determined by the Court to be  
7 in compliance with the ESA and the decision in *Wild Fish Conservancy*  
8 *v. Salazar*, 628 F.3d 513 (9th Cir. 2010). These exceptions are:

9 a. Without notice where damage is imminent, structures 2 and 5  
10 may be closed for flood control, i.e., rain on snow event, floods  
11 and/or high stream flow events. FWS shall notify WFC as soon as  
12 practicable.

13 b. Without notice to WFC, FWS may close structures 2 and 5 to  
14 prevent imminent damage to said structures and for their maintenance  
15 and preservation under circumstances where a true emergency requiring  
16 such actions can be shown. FWS shall notify WFC as soon as  
17 practicable.

18 c. With 48 hours advance notice to WFC, FWS may lower the radial  
19 gates at structure 2 to facilitate pre-smolt emigration during release  
20 in or around late April but no later than May 15.

21 d. With 48 hours advance notice to WFC, FWS may temporarily  
22 close structures 2 and 5 to recharge aquifer wells where deemed  
23 absolutely necessary to permit FWS to fulfill its statutory mission.  
24 Such closures shall be held to the minimum necessary.

25 e. With 48 hours advance notice to WFC, FWS may close structures  
26 2 and 5 in the event that a 50 returning adult spring Chinook salmon  
27 threshold is reached at structure 5 during the broodstock collection  
28 period to limit upstream passage of spring Chinook salmon while

1 minimizing potential impacts, i.e., disease, to non-target taxa.

2 10. The parties shall file a joint status report within thirty  
3 (30) days of FWS' provision of the new biological opinion to the Court  
4 and WFC describing the parties' respective positions on whether the  
5 injunctive relief should be terminated and whether further proceedings  
6 are necessary to determine whether the Hatchery is in compliance with  
7 the ESA and the decision in *Wild Fish Conservancy v. Salazar*, 628 F.3d  
8 513 (9th Cir. 2010).

9 11. If any party desires to be heard in an expedited manner  
10 regarding mootness or jurisdictional issues, or injunctive relief  
11 issues, it shall so note such motion on an expedited basis, according  
12 to local rules.

13 12. Defendants' Motion to Strike, **Ct. Rec. 210**, is **GRANTED in**  
14 **part, and DENIED in part.** The second Gayeski declaration is stricken  
15 and pages 21-30 of Plaintiff's Additional Briefing Regarding Proposed  
16 Orders (Ct. Rec. 209) are admitted. Defendants' Motion to Expedite,  
17 **Ct. Rec. 211**, is **GRANTED.**

18 **IT IS SO ORDERED.** The District Court Executive is directed to  
19 enter this order and to provide copies to all counsel.

20 **DATED** this 5<sup>th</sup> day of May, 2011.

21  
22 **s/Lonny R. Suko**

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24 LONNY R. SUKO  
25 United States District Judge  
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